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Supreme Court, U.S.
FILED

09-653 NOV 24 2009

OFFICE OF THE CLERK
William K. Suter, Clerk

No.: _____

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IN THE

SUPREME COURT OF THE UNITED STATES

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THOMAS J. GEARING – PETITIONER

vs.

CALIFORNIA – RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE SUPERIOR COURT OF CALIFORNIA,
IN AND FOR LOS ANGELES COUNTY,
APPELLATE DEPARTMENT

# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Since a self-represented defendant has two roles in a trial proceeding – the accused and the advocate – was Petitioner's Sixth and Fourteenth Amendment rights violated when the sentencing court considered Petitioner's manner, tone and tenor of the presentation of evidence and arguments when affixing Petitioner's punishment?

## LIST OF PARTIES

| | |
|---|---|
| Thomas J. Gearing: | Petitioner here; Defendant and Appellant below |
| Superior Court of California | Respondent here |
| People of the State of California | Plaintiff and Respondent below |

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Thomas J. Gearing, petitioner, by and through his attorney, Edgar Eugene Page, of Page & Page Attorneys at Law, prays that a writ of certiorari issue to review the judgment below.

## STATEMENT OF JURISDICTION

This Court has jurisdiction per 28 U.S.C. § 1257(a) because Mr. Gearing seeks review from a "[f]inal judgment[] ... rendered by the highest court of a State in which a decision could be had."

The highest court of the State of California in which a decision could be had is the Appellate Department of the Superior Court of California, In and For Los Angeles County.

After his misdemeanor conviction, Mr. Gearing appealed his conviction and sentence to the Appellate Department of the Superior Court of California, In and For Los Angeles County. Cal.Ct.R. 8.850.

The appellate division of the Superior Court of California has the discretion to certify a case for transfer to the Court of Appeal on its own motion or on a party's application. Cal.Ct.R. 8.1005(a)(1).

Or, a Court of Appeal has the discretion to order a case transferred to it for hearing and decision if the appellate division has certified the case for transfer or the Court of Appeal has determines that transfer is necessary to secure uniformity of decision or to settle an important question of law. Cal.Ct.R. 8.1002; 8.1008(b)(1).

Moreover, "the decision whether to order transfer of a case originating in the municipal court is insulated from review" by the California Supreme Court. *Snukal v. Flightways Manufacturing, Inc.*, 23 Cal. 4th 754, 765-766 (Cal. 2000).

Therefore, Mr. Gearing has exhausted all his state procedural requirements and has obtained a decision from the highest court of the State of California in which discretionary review could be had.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner's federal constitutional rights are involved related to self-representation. U.S. Const., amends. VI, XIV; *Faretta v. California*, 422 U.S. 806 (1975).

Petitioner's federal constitutional rights are involved related to the manner and tone and tenor of his self-representation as an effective advocate. U.S. Const., amends.VI, XIV; *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970); *Reece v. Georgia*, 350 U.S. 85, 90 (1955); *Glasser v. United States*, 315 U.S. 60, 69-70 (1942); *Avery v. Alabama*, 308 U.S. 444, 446 (1940); and *Powell v. Alabama*, 287 U.S. 45, 57 (1932).

Petitioner's federal constitutional rights are involved related to sentencing. U.S. Const, amends. VI, XIV; *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Blakely v. Washington*, 542 U.S. 296, 303 (2004); *Cunningham v. California*, 549 U.S. 270, 274 (2007); *Black v. California*, 549 U.S. 1190, 1199 (2007).

## TIMELINESS OF PETITION

### 1. Finality Of The State Court Decision

> "A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review."

Sup.Ct.R. 13.1, cl. 2.

Here, the superior court appellate division's ruling was subject to discretionary review by California Court of Appeal, Second Appellate District. Cal.Ct.R. 8.1008(b)(1).

A timely filed discretionary petition was ultimately denied on August 26, 2009. Appx. 4.

### 2. This Petition Timely Filed Pursuant To Rule 29(2)

Petitioner timely files this petition for writ of certiorari per Supreme Court Rule 29(2) because he "delivered on or before the last day for filing to a third-party commercial carrier for delivery to the Clerk within 3 calendar days."

## STATEMENT OF THE CASE

On February 22, 2007, the prosecution filed a four-count misdemeanor complaint against Petitioner alleging that Petitioner drove under the influence of alcohol (Veh. Code, § 23152(a); count I), drove with 0.08 percent or more blood- alcohol level (Veh. Code, § 23152 (b); count II). The prosecution dismissed the remaining counts on May 10, 2007.

On March 4, 2007, Petitioner, a licensed attorney, moved to represent himself in the case, and a *Faretta*[1] waiver was signed and filed.

Mr. Gearing was offered no jail time and no CalTrans work pretrial and after trial, he was given 20 days in jail and 20 days of CalTrans work. The court noted that one of the factors, and the appellate court found it to be an appropriate factor was Mr. Gearing's manner and tone and tenor in which the evidence and arguments were presented in this case in deciding an ultimate sentence. Appx. 1.

He received a greater sentence after his trial of "20 days in county jail and 20 days of Cal Trans" when pretrial the offer was "no jail time or Cal Trans." Appx. 1.

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[1] *Faretta v. California*, 422 U.S. 806 (1975).

Petitioner filed a motion for reconsideration of the sentence, which the trial court heard and denied on September 11, 2007.

At the close of the hearing on Mr. Gearing's motion for reconsideration of his sentence, the trial court stated:

> With regards to the punishment or the sentence itself with regards to this case, the court took into consideration all of the evidence in this trial, as well as any mitigating and aggravating circumstances in this case. *And the court not only heard the evidence in this case but heard the manner and tone and tenor in which the evidence and arguments were presented in this case in deciding an ultimate sentence in this case.*

(Appx. 1 [italics in original.)

The trial court did not elaborate as to what manner and tone and tenor influenced its sentencing decision; nor did the court explain how such conduct influenced its sentencing decision.

After his conviction, Petitioner timely filed a

notice of appeal in the Appellate Department of the Superior Court, In and For Los Angeles County.

Petitioner filed his opening brief on June 26, 2008. The prosecution filed its response brief on December 10, 2008. Petitioner filed his reply brief on February 17, 2009, and he filed a supplemental brief on February 23, 2009.

The Appellate Division panel issued a judgment order, affirming Petitioner's conviction and sentence, on June 19, 2009. Which is final on June 20, 2009, since July 19, 2009, was a Sunday. Cal.Code.Civ. Proc., § 135.

Petitioner filed a petition for rehearing, and in the alternative, an application to transfer the case to the California Court of Appeal, For the Second Appellate District.

The Appellate Division panel denied the petition and the application on July 20, 2009.

Petitioner filed a petition for reconsideration of the denials on July 23, 2009.

Petitioner timely filed a petition to transfer from the Appellate Division in the California Court of Appeal, For the Second Appellate District, received

on August 5, 2009.

The California Court of Appeal, For the Second Appellate District, denied the petition, on August 26, 2009.

The Appellate Department of the Superior Court, In and For Los Angeles County issued the remittitur issued on August 5, 2009.

On October 13, 2009, Petitioner filed a motion to recall the remittitur and to reinstate his appeal. As of the date of filing this petition, Appellate Department of the Superior Court, In and For Los Angeles County, has not made a decision regarding the recall motion.

## REASONS FOR GRANTING THE PETITION

1. A Self-represented Defendant Has Two Roles In A Trial Proceeding – The Accused And The Advocate – The Sentencing Court Should Not Consider The Manner, Tone And Tenor Of The Presentation Of Evidence And Arguments When Affixing Punishment Otherwise The Petitioner's Sixth And Fourteenth Amendment Rights Are Violated

This petition raises an important federal question. Sup. Ct. R. 10(c).

Petitioner represented himself at his trial and sentencing.

Petitioner was actually complemented by the trial court judge just before he rested his case. The judge stated "so far, Mr. Gearing, you have done an excellent job in keeping your opening and your direct reasonably brief, and I appreciate that." Appx. 5]. The defense rested shortly after that remark, and jury instructions were given along with closing arguments.

At sentencing, the prosecutor commented

about the defendant's advocacy. However, the prosecutor did not cite to any particular misconduct of Mr. Gearing; instead, the prosecutor cited to Mr. Gearing's closing arguments which were not improper arguments for an advocate to advance. Witness credibility and witness bias are always proper issues to raise during closing argument. Appx. 6.

Later, the trial court specifically noted that it took into consideration the defendant's "manner and tone and tenor in which the evidence and arguments were presented" in deciding the "ultimate sentence." Appx. 1. There is no citation to any particular misconduct of Mr. Gearing.

The appellate court found that the trial court comments "reflected a consideration of proper facts" and the lower court "therefore disagree that an inference may be drawn from said remarks that defendant was being punished for representing himself." Appx. 1.

However, what other inference can be made when the trial court specifically states that it took into consideration "the manner and tone and tenor in which the evidence and arguments were presented in deciding an ultimate sentence in this case?" There was no citation to the record as to any misconduct of

Mr. Gearing in his role as a trial advocate.

Petitioner exercised his federal constitutional right to represent himself as articulated in *Faretta v. California* (1975) 422 U.S. 806. The trial court considered the manner and tone and tenor in which the evidence and arguments were presented in this case in deciding an ultimate sentence in a criminal matter. This should run afoul of Sixth and Fourteenth Amendments and well-established Supreme Court rulings.

The appellate division of the superior court found no error, and the California Court of Appeals did not exercise its discretion to consider this important federal question.

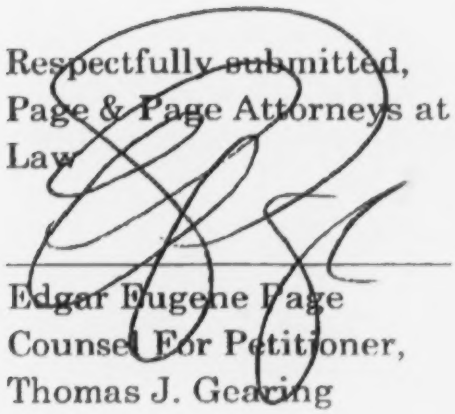
Petitioner submits that a defendant's advocate's conduct is not allowed to be held against him. Therefore, when a defendant is the advocate and he conducts himself within the bounds of an advocate, the zealous advocacy should not be held against him without violating his fundamental constitutional rights.

## CONCLUSION

Petitioner prays that his petition for writ of certiorari shall be granted.

November 24, 2009

Respectfully submitted,
Page & Page Attorneys at Law



Edgar Eugene Page
Counsel For Petitioner,
Thomas J. Gearing

# APPENDIX 1

Filed
LOS ANGELES SUPERIOR COURT
JUL 19 2009
John A. Clarke, Executive Officer/Clerk
By /s/ [illegible] A. Bird, Deputy

APPELLATE DIVISION OF
THE SUPERIOR COURT

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

| | |
|---|---|
| PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>THOMAS J. GEARING,<br><br>Defendant and Appellant. | No. BR045722<br><br>Van Nuys Trial Court<br>No. 7VY00778<br><br>MEMORANDUM JUDGMENT |

This cause having been submitted for decision, and fully considered, judgment is rendered as follows:

The judgment is affirmed.

Following a jury trial, Thomas Jerome Gearing (defendant) was convicted of violating Vehicle Code[2] section 23152, subdivision (a), driving while under the influence of an alcoholic beverage, and section 23152, subdivision (b), d riving with 0.08 percent or more blood-alcohol level. Defendant appeals from the judgment.

FACTUAL AND PROCEDURAL BACKGROUND[3]

On February 12, 2007, at approximately 2:30 a.m., Sergeant David Songer noticed a black Escalade "straddling lanes" and weaving between lanes in a "serpentine" motion. Songer initiated a traffic stop and contacted defendant, who was the driver. Songer noticed that defendant smelled of alcohol, his eyes were red and watery, and his speech was "slurred and thick." Defendant admitted to Songer that he had been drinking. Songer then called for a "beat" officer to investigate whether defendant

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2 All further statutory references are to the Vehicle Code unless otherwise specified.

3 The testimony and proceedings will be summarized to the extent necessary to address defendant's contentions on appeal. In accordance with established appellate procedure, the evidence is summarized in the light most favorable to the verdict. (*People v. Perez* (2000) 82 Cal.App.4th 760, 763.) Quoted matter appears as in the original text unless otherwise indicated. Full capitalization is omitted when quoting from the reporter's transcript.

was driving under the influence. Officer Mark Johnson responded and conducted a number of field sobriety tests. The results of said tests were consistent with someone who is impaired by alcohol. Defendant was arrested and transported to the police station, where he submitted a blood sample for testing at 3:55 a.m. The results of the test showed a 0.13 percent blood-alcohol content.

On February 22, 2007, a four-count misdemeanor complaint was filed against defendant. The complaint charged defendant with driving under the influence of an alcoholic beverage (§ 23152, subd. (a); count I), driving with 0.08 percent or more blood-alcohol level (§ 23152, subd. (b); count II), driving with a suspended or revoked license (§ 14601.5, subd. (a); count III), and driving without a valid driver's license (§ 12500, subd. 18 (a); count IV). Defendant was arraigned and pleaded not guilty to all counts. On March 4, 19 2007, defendant, a licensed attorney, moved to represent himself in the case, and a Faretta[4] waiver was signed and filed. On May 10, 2007, the court granted the People's motion to dismiss counts III and IV in furtherance of justice pursuant to Penal Code section 1385. On June 26, 2007, the jury trial commenced on counts I and II.

*Motion In Limine to Exclude the Results of Defendant's Personal Breathalyzer Test*

[Deleted by Petitioner as issued not raised in

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[4] *Faretta v. California* (1975) 422 U.S. 806.

this petition.]

*Defendant's Testimony*

Defendant testified that he consumed three beers during dinner, and four or five "vodka shooters" at a post-Grammy party at the Roosevelt Hotel later that evening, the last of which was consumed around 1:40 a.m. to 1:50 a.m. He left the party at closing time, around 2:00 a.m., and attempted to get a room for the night. The hotel had no vacancies and defendant left shortly thereafter to drive home. Defendant testified that he was not "feeling the effects of the alcohol" when he left. As he was driving on the freeway, he attempted to send a text message, which caused him to "weave[] a little bit." [Deleted by Petitioner.] Subsequently, after the police conducted their investigation, defendant chose to provide a blood sample for testing.

*Expert Testimony*

The People's expert, Christopher Breyer, estimated that defendant's blood alcohol content was 0.15 at the time he was stopped based on the length of time between defendant's last drink and the blood sample test. Defendant's expert, Dewayne Beckner, estimated that defendant's blood alcohol content was about 0.07 at the time of the stop. Beckner based his opinion "a great deal" on information provided to him by defendant.

*Verdict and Sentencing*

On July 3, 2007, the jury found defendant guilty. The court suspended imposition of sentence

and placed defendant an summary probation for 36 months, under various terms and conditions, including 20 days in county jail and 20 days of Cal Trans. Defendant filed a motion for reconsideration of the sentence, which was heard and denied on September 11, 2007.

Defendant timely filed a notice of appeal from the judgment.

## CONTENTIONS ON APPEAL

[Sentence deleted by Petitioner.]

Defendant additionally contends that the court considered improper factors in determining his sentence.

## DISCUSSION

*Exclusion of Breath Test Results*

[Deleted by Petitioner as issued not raised in this petition.]

*Sentencing*

Prior to trial, defendant was offered a plea agreement by the People that included probation with no jail time or Cal Trans. After defendant was found guilty, the court sentenced defendant to summary probation, including 20 days in county jail and 20 days of Cal Trans, noting that it considered "what [defendant] has said, what the People have said, and.. . both the mitigating and aggravating factors... ." Defendant then filed a motion for reconsideration of the sentence, which was heard on September 11, 2007. In denying the motion, the court expressly stated that defendant was not

"punished for going to trial in the case" and that defendant's sentence "took into consideration all of the evidence in this trial, as well as any mitigating and aggravating circumstances in this case. *And the court not only heard the evidence in this case but heard the manner and tone and tenor in which the evidence and arguments were presented in this case in deciding an ultimate sentence in this case.*" (Italics added.)

Defendant contends that the italicized portion of the court's remarks shows that the court improperly considered defendant's exercise of his right to a jury trial and imposed a more severe sentence than was offered in the plea deal. We reject defendant's claim.

"The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.' [Citation.]" (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 26 1968, 977-978.)

It is well-settled "that to punish a person for exercising a constitutional right is 'a due process violation of the most basic sort. '" (*In re Lewallen* (1979) 23 Cal.3d 274, 278 (*Lewallen*), citing *Bordenkicher v. Hayes* (1978) 434 U.S.- 357, 363.)

Thus, a court "may not treat a defendant more leniently because he foregoes his right to trial or more harshly because he exercises that right.' [Citation.]" (*Lewallen*, *supra*, 23 Cal.3d at pp. 278-279.) However, "[i]t is clear that under appropriate circumstances a defendant may receive a more severe sentence following trial than he would have received had he pleaded guilty ... . [Citation.]" (*Id.* at p. 281.)

Here, we disagree that an inference may be drawn from the foregoing italicized language that the court's probationary order was improperly influenced by defendant's exercise of his right to a jury trial. Indeed, in light of the court's preceding statement that defendant was not being punished for going to trial, it is clear that the italicized remarks reflect a consideration of "the nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at trial.' [Citations.]" (*Alvarez*, *supra*, 14 Cal.4th at p. 978, 14 quoting *People v. Morales* (1967) 252 Cal.App.2d 537, 547.) The court may properly consider such factors in determining the appropriate sentence. (*Ibid.*) Furthermore, after reviewing the record, we are satisfied that there is nothing contained therein to suggest the court improperly considered defendant's exercise of his right to a jury trial. (*Cf. Lewallen*, *supra*, 23 Cal.3d at pp. 279-281 [finding abuse of discretion based on

the comments of the sentencing judge]; *People v. Morales*, *supra*, 252 Cal.App.2d at pp. 542-546 [same].)

We briefly note that defendant alternatively argues that the italicized language shows the court improperly punished him for representing himself. We reject this argument. For the same reason discussed *ante*, it is clear the italicized remarks reflect a consideration of proper factors, and we therefore disagree that an inference may be drawn from said remarks that defendant was being punished for representing himself.

Based on the foregoing, we find no abuse of discretion in the court's sentencing order. The record does not support defendant's assertion that the court impermissibly punished him for representing himself or exercising his right to a jury trial.

DISPOSITION

The judgment is affirmed.

s/ F. Wasserman
Wasserman, J.

We concur.

s/ D.K. Weintraub
Weintraub, J.

s/ Anita H. Dymant
Dymant, J.

# APPENDIX 2

Filed
LOS ANGELES SUPERIOR COURT
JUL 20 2009
John A. Clarke, Clerk
By /s/ M. Reinoso
M. Reinoso, Deputy

APPELLATE DIVISION OF
THE SUPERIOR COURT

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

| | |
|---|---|
| PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>THOMAS J. GEARING,<br><br>Defendant and Appellant. | No. BR045722<br><br>Van Nuys Trial Court No. 7VY00778<br><br>ORDER |

Pursuant to California Rules of Court, a party may serve and file within 15 days after a decision is

filed, a petition for rehearing or an application for certification. (Cal. Rules of Court, rules 8.889(b) & (c), 8.1005(b)(1).) For good cause, the time for filing a petition on for rehearing may be extended up to the date the judgment is final. (Cal. Rules of Court, rule 8.889(b)(4).) Appellant failed to timely file his petition for rehearing and application for certification, or to show good cause for the delay.

No good cause appearing, appellant's "Request to File Petition for Rehearing and Application for Certification for Transfer to the California Court of Appeal, Second Appellate District Nunc Pro Tunc" are denied.

s/ F. Wasserman
Wasserman, J.

s/ D.K. Weintraub
Weintraub, J.

s/ Anita H. Dymant
Dymant, J.

# APPENDIX 3

Filed
LOS ANGELES SUPERIOR COURT
JUL 30 2009
John A. Clarke, Executive Officer/Clerk
By /s/ [illegible] A. Bird, Deputy

APPELLATE DIVISION OF
THE SUPERIOR COURT

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

| | |
|---|---|
| PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>THOMAS J. GEARING,<br><br>Defendant and Appellant. | No. BR045722<br><br>Van Nuys Trial Court No. 7VY00778<br><br>ORDER |

Appellant's "Motion to Reconsider Order Filed July 20, 2009" is denied.

s/ F. Wasserman
Wasserman, J.

s/ D.K. Weintraub
Weintraub, J.

s/ Anita H. Dymant
Dymant, J.

# APPENDIX 4

COURT OF APPEAL - SECOND DIST
FILED
AUG 26 2009
JOSEPH A. [LN], Clerk
s/ [NAME], Deputy Clerk

IN THE CALIFORNIA COURT OF APPEAL

IN AND FOR THE SECOND APPELLATE DISTRICT

| | |
|---|---|
| PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>THOMAS J. GEARING,<br><br>Defendant and Petitioner. | No. B218006<br><br>Los Angeles County Appellate Division No.: BR 045722<br><br>Van Nuys Trial Court No. 7VY00778<br><br>ORDER |

It appearing that transfer of the above-entitled matter to this Court is not necessary (Cal. Rules of Court, rule 8.1008), the petition, filed August 5, 2009, is denied.

Rothschild, Acting P.J.
ROTHSCHILD, Acting P.J.

Johnson, J.
JOHNSON, J.

# APPENDIX 5

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NW 115
HON. STEPHEN P. PFAHLER, JUDGE

| | |
|---|---|
| PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff,<br><br>v.<br><br>THOMAS J. GEARING,<br><br>Defendant. | Case No. 7VY00778 |

REPORTER'S TRANSCRIPT ON APPEAL
LOS ANGLES, CALIFORNIA

MONDAY, JULY 2, 2007
Page 554

TERESA A. DESIMONE, CSR # 3637
OFFICIAL REPORTER

evidence that has been presented in this case?
The Court: All right, both sides.
Mr. Mallow: Clearly.
The Court: All right.
Mr. Gearing: But you did give us a 3 hour cap. I'm going to do my best.
The Court: All right. So far, Mr. Gearing, you have done an excellent job in keeping your opening and your direct reasonably brief, and I appreciate that.
The Court: Deputy, so we are going to ask the jury to come back at 1:30 sharp please. Thank you.
The Bailiff: All right.
The Court: We are in recess.
Mr. Mallow: Thank you, Your Honor.

(Whereupon, the noon recess was taken. Thereafter the proceedings resumed in open court outside the presence of the jury as follows:)

The Court: All right. We are back on the record, People versus Thomas Gearing. Let the record reflect Mr. Gearing is present, Mr. Mallow is present,

outside the presence fo the jury. I'm ready to bring the
jury in, eigther side need to be hear?
Mr. Gearing: Yes, Your Honor, We haven't made a
decision on the proposed People versus Loomis instruction
prepared.

# APPENDIX 6

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NW 115
HON. STEPHEN P. PFAHLER, JUDGE

| | |
|---|---|
| PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff,<br><br>v.<br><br>THOMAS J. GEARING,<br><br>Defendant. | Case No. 7VY00778 |

# REPORTER'S TRANSCRIPT ON APPEAL
LOS ANGLES, CALIFORNIA

MONDAY, JULY 2, 2007
Pages 631-632

TERESA A. DESIMONE, CSR # 3637
OFFICIAL REPORTER

Mr. Gearing: No, sir.
The Court: All right. And do you wish to comment with regards to – you don't have to if you don't want to – but do you wish to comment on what you believe would be an appropriate sentence or no?
Mr. Gearing: (No response.)
The Court: Do The People wish to be heard? actually it should have gone the other way around.
Mr. Hiscocks: Actually, that would be fine, Your Honor.
Mr. Gearing: Can he speak and then I will?
The Court: Yes, absolutely, Mr. Gearing.
Mr. Hiscocks: Your Honor, thank you. The People would like to be heard, and I thank the Court for the opportunity of having me speak to this issue. Mr. Mallow obviously did an excellent job in handling the trial matter, but just based upon my experience as a prosecutor, and given the fact that I was present for most of the trial it was agreed that I would speak to the Court with regards to the sentencing.

In this matter, Your Honor, The People would note that the defendant was convicted of two counts, a violation of Vehicle Code section 23152(a) and a violation of Vehicle Code section 23152(b). So this jury found that not only was the defendant driving with a .08 percent or greater of blood alcohol in his system, but that he was driving and not exhibiting the prudence of a sober person when he was

driving and, therefore, that he was a danger on the roads.

The defendant in this matter refuses to take responsibility for his actions. The defendant took this stand, and in the view of The People the jury has determined that he was less than truthful in his testimony.

The defendant claimed that the officers were less than forthright. The defendant claimed that Mr. Breyer was somehow less than forthright in his testimony. The defendant in his argument and by his Actions claimed that there was some sort of malreasance or mal- – or basically misconduct by the prosecution in pursuing this case.

All of these things belie the fact that the defendant had a blood alcohol level of .13, and that this jury determined that the testimony of the defendant's expert which was based upon a – who came to a

conclusion
that he was under the legal limit based upon the self-serving statements of the defendant by the expert's own testimony, all his results were based upon a drinking pattern put forward to him by the defendant. This defendant testified that he had at least three drinks at dinner. He went on and drank, drinks that tasted like candy was the defendant's testimony. He had several drinks. Frankly, Your Honor, at this point in time I don't believe the defendant knows how many drinks he

IN THE

SUPREME COURT OF THE UNITED STATES

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THOMAS J. GEARING – PETITIONER

vs.

CALIFORNIA – RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE SUPERIOR COURT OF CALIFORNIA,
IN AND FOR LOS ANGELES COUNTY,
APPELLATE DEPARTMENT

PROOF OF SERVICE

STATE OF CALIFORNIA ]
COUNTY OF SAN FRANCISCO ]

I, Kathleen C. Page, do hereby declare and affirm that:

1. I am over the age of eighteen years.
2. I am not a party to the attached action.
3. My business mailing address is Post Office Box 2837, San Francisco, Calfiornia.

4. On November 24, 2009, I caused to be served the attached PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage paid, or by a third-party commercial carrier for delivery within 3 days.

The names and address of those served are as follows:

Office of the Solicitor General
United States Department of Justice
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Washington, D.C. 20530
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Respondent's Representative:
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Los Angeles City Attorney
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200 North Main Street
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(213) 473-6900

I declare under penalty of perjury, under the laws of the United States, that the forgoing is true and correct

Executed on November 24, 2009.

Kathleen C. Page

Kathleen C. Page